

## Unlawful killing: Manslaughter section 303

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### Legislation

#### 303 Definition of manslaughter

- (1) A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.

### Commentary

#### *A species of unlawful killing*

Section 291 provides, “It is unlawful to kill any person unless such killing is authorised or justified or excused by law”. Pursuant to section 300, an offender who commits an unlawful killing will be guilty of either “murder or manslaughter, depending on the circumstances of the case”. A charge of murder pursuant to section 302(1) requires proof of unlawful killing in any of the circumstances specified therein. If there has been an unlawful killing but the circumstances in section 302(1) are not present then, pursuant to section 303(1), the offender will be guilty of manslaughter.

Manslaughter is an available inherent alternative to a charge of murder (per section 576) and, if murder is charged, manslaughter need not be alleged as a separate count in the indictment. If there is to be a prosecution for an unwilling killing but the prosecution do not charge it as murder then the charge of manslaughter will be specifically alleged as a count in the indictment.

#### *Elements*

Manslaughter’s elements derive from sections 293 (definition of killing) and 300 (unlawful homicide). The three elements are:

- (1) the deceased is dead;
- (2) the defendant caused the deceased’s death;
- (3) the defendant did so unlawfully, ie any defences are excluded beyond a reasonable doubt.

These elements are set out as a potential jury handout in appendix A below.

#### *Manslaughter an inherent alternative to murder*

If an unlawful killing occurs where none of the circumstances listed in section 302(1) are proved – ie where it is not murder – the offender will be guilty of manslaughter, per section 303(1). If a charge of murder is indicted, manslaughter (a form of “unlawful killing” per section 300) need not be alleged as a separate count from murder in the indictment because it is an available inherent alternative to a charge of murder (per section 576). If not, then manslaughter will be the offence set out in the indictment.

### *The element of causation*

Section 293 provides “any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person”.

The allegedly causative acts or omissions need not be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death - per *Royall v The Queen* (1991) 172 CLR 378 at 398, 411, 423. This principle is to be understood subject to s 296 “Acceleration of death”, section 297 “When injury or death might be prevented by proper precaution” and section 298 “Injuries causing death in consequence of subsequent treatment”.

In *Royall v The Queen* (1991) 172 CLR 378, at 387, 411-412, 423, 441, the High Court endorsed the statement of Burt CJ in *Campbell v The Queen* (1980) 2 A Crim R 157 at 161 that it is enough if juries are told that the question of cause is not a philosophical or scientific question but a question to be determined by them applying their common sense to the facts as they find them, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.

Because the critical time to assess the operation of potential defences is the time the defendant committed the act(s) resulting in death, difficulties with unanimity can arise where death has potentially been caused by a range of acts committed over some time by the accused and there is uncertainty as to which of those acts had a fatal contribution. In *Lane v The Queen* [2018] 265 CLR 196 the High Court allowed an appeal where the case had been left to the jury on the basis the fatal injury may have been inflicted in one of two separate physical events involving the appellant. It transpired on appeal that the earlier event was not sufficient to sustain a conviction whereas the latter was. The conviction could not be salvaged via the proviso by reason of the strength of the evidence re the second event because, in the absence of a direction as to the need to be unanimous about what the fatal acts were, it remained a possibility some jurors convicted solely on the basis of the first event. Where it is open to the jury to be satisfied one or more of a range of potentially fatal acts of the defendant caused death but the jury may be uncertain which one or more of those acts caused death, the jury should be instructed of the need to be unanimous:

- (a) as to the acts included within that range of potentially fatal acts,
- (b) that potential defences have been excluded in respect of all of that range of acts.

Note that acts or omissions may cause death. Where death allegedly results from the accused’s failure to meet a duty of care then the accused may be deemed to have caused that result by the operation of:

- section 285 Duty to provide necessaries;
- section 286 Duty of person who has care of a child;
- section 288 Duty of persons doing dangerous acts;
- section 289 Duty of persons in charge of dangerous things.

Each of those sections provides, where their elements apply, that the defendant “is held to have caused any consequences” that “result to ... life or health”.

### *The element of unlawfulness*

Section 291 provides, “It is unlawful to kill any person unless such killing is authorised or justified or excused by law”.

Defences providing such authorisation, justification or excuse include section 23 “Intention – motive” (accident), section 27 “Insanity”, section 266 “Prevention of crimes”, section 267 “Defence of dwelling”, section 271 “Self-defence against unprovoked assault”, section 272 “Self-defence against provoked assault” and section 273 “Aiding in self-defence”. Section 31 “Justification and excuse – compulsion” is also an available defence to manslaughter – per *Pickering v The Queen* (2017) 260 CLR 151.

The operation of section 23 is, per section 23(1), “Subject to the express provisions of this Code relating to negligent acts and omissions”. Thus section 23 will not excuse the consequences of criminal negligence. For example, in manslaughter cases involving the use of weapons such as guns and knives, section 289 “Duty of persons in charge of dangerous things” (see chapter 93 of this Benchbook) is sometimes left to the jury as a basis (or alternative basis) of liability for manslaughter. Section 23 is no defence to liability on that basis.

The trial judge is obliged to leave a defence to the jury, even if not sought by defence counsel, if, on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the defence has been excluded - per *Masciato v The Queen* (1995) 183 CLR 67-68.

### **Suggested Direction**

**Our law provides that any person who unlawfully kills another is guilty of a crime which is called murder or manslaughter according to the circumstances of the case. The prosecution does not allege the circumstances here constituted murder but it does allege they constituted the offence of manslaughter.**

**Proof of any offence requires proof of the elements of the offence. The elements of an offence are the essential ingredients of it, all of which must be proved beyond a reasonable doubt to prove the offence.** (It will assist to accompany the direction with a jury handout listing the elements – see the example at appendix A below)

**The offence of manslaughter involves the unlawful killing of a human being. To prove the offence the prosecution must prove the following three elements beyond a reasonable doubt:**

- 1. that [X] is dead;**
- 2. that the defendant caused [X]’s death;**
- 3. that the defendant did so unlawfully.**

**I will now discuss each element.**

**Element 1 requires that [X] is dead. In this case it has been admitted [and/or there is uncontradicted evidence] that [X] is dead.** [If there is an issue as to whether X is dead, explain the relevant issue(s) of fact which the jury must determine in deciding whether X is dead].

**Element 2, the element of causation, requires that the defendant caused [X]’s death. To decide whether the defendant caused [X]’s death you will need to decide whether [X]’s death was caused by the acts alleged against the defendant.** [This direction only refers to “acts”, not “omissions”, for drafting convenience – those references will require variation to refer to omissions if omissions by the defendant are alleged to attract liability. The direction will require modification if death is alleged to result from the criminal negligence of the defendant – for example see the directions at chapter 93 of this Benchbook.]

**Our law provides a person who causes the death of another, directly or indirectly and by any means whatever, is deemed to have killed that other person.**

**[If death was delayed - It does not matter that death was not immediate. If the acts of the defendant led to the injury/condition of the deceased which in the ordinary course resulted in the death, then in law the defendant is responsible for that death however long after the defendant’s acts the death occurred.]**

**The means by which a person causes the death of another may be direct or indirect, as long as those means are, or are caused by, the defendant's acts. To prove the defendant's acts caused death it is not necessary to prove they were the sole or only contributing cause of death. However, it must be proved the defendant's acts were a substantial or significant cause of death or contributed substantially to the death.**

[Where the events causing death are uncertain or there are competing innocent causes: - **Whether it has been proved that the defendant's acts were a substantial or significant cause of death or contributed substantially to the death is not a question for scientists or philosophers. It is a question for you to answer, applying your common sense to the facts as you find them, appreciating you are considering legal responsibility in a criminal matter and the high standard of satisfaction required is proof beyond a reasonable doubt.**]

**In considering whether the defendant caused [X]'s death you should take into account what (if anything) is known as to the medical cause of [X]'s death. The medical cause of death in the present case is alleged to be ...** [Here identify the evidence based medical cause of death or, if it is unknown, the evidence relied upon to establish the mechanism(s) of death by inference. If the mechanism relied upon by the prosecution is in issue identify the material facts and or inferences to be determined].

**Your consideration of the defendant's conduct as potentially causing death must be confined to such of the defendant's acts, if any, as have been proved beyond a reasonable doubt. This element of causation will only have been proved if you are satisfied beyond a reasonable doubt that acts of the defendant which you find to have been proved beyond a reasonable doubt were a substantial or significant cause of death or contributed substantially to the death.**

**The act(s) of the defendant alleged by the prosecution to have caused death is/are ...** [Here list the act(s) relied upon (adjusting the direction appropriately if omissions are relied upon). Where the identity of the defendant as the actor or

the occurrence or causal contribution of any acts is in dispute, identify the factual dispute(s) which the jury must resolve. This may require a direction about circumstantial evidence where an act or omission is alleged as an inference arising from proved facts.].

[Where more than one act of the defendant may have caused death and the acts range over time or circumstance to such an extent it is necessary to avoid future doubt as to unanimity – **It may be that you conclude the deceased’s death was caused by one or more of a range of the defendant’s acts, but are uncertain or cannot agree as to exactly which of them, alone or in combination, was fatal.** [Identify the set of acts of the defendant which in this case the jury could conclude are the acts which alone or in combination may have caused death]. **Your uncertainty or lack of agreement about the exact causative contribution of the range of potentially fatal acts will not prevent the prosecution proving this element of causation, as long as you conclude it must have been one or more of the acts within that range which caused death. It is important for your further deliberation about element 3 however that you reach unanimous agreement on which of the defendant’s acts are included within the range of potentially fatal acts. That is necessary because for a jury to reach unanimous agreement that an offence has been committed each juror must be satisfied the offence is constituted by the same acts. Thus, if you are satisfied element 2 is proved because, despite doubts about the precise cause of death, you are satisfied beyond reasonable doubt that death must have been caused by one or more of a range of potentially fatal acts of the defendant, ensure you are unanimously agreed as to the content of that range so it will be that range of acts you consider when you refer to the acts of the defendant in considering element 3.]**

**Element 3, the element of unlawfulness, requires that in causing [X]’s death the defendant did so unlawfully. All killing is unlawful, unless authorised, justified or excused by law. Our law creates some defences which can operate to excuse a killing, making it lawful. A well known example is acting in self-defence. Where the facts raise the possibility such a defence may**

**apply it is not for the defendant to prove it applies. Rather it is for the prosecution to exclude the application of such a defence beyond a reasonable doubt. The prosecution must do this because if there lingers a real possibility that such a defence operates to excuse the defendant then the prosecution will not have proved beyond reasonable doubt that the accused's actions were unlawful.**

**In the present case....** [Here indicate whether any defences, such as self-defence, compulsion or accident arise for the jury's consideration and, if any do, proceed to explain the operation of the defence(s) including the prosecution's obligation to exclude them. Note that if death is alleged to have been caused by the criminal negligence of the defendant, the opening words of s 23(1) exclude application of the defence of accident to that alleged basis of liability. Where the defendant's acts attracted the unanimity direction re the range of potentially fatal acts in element 2 - **You will recall I directed you in discussing element 2 that if you are satisfied beyond reasonable doubt death must have been caused by one or more of a range of potentially fatal acts of the defendant, you must unanimously agree upon the content of that range. In order for the prosecution to exclude the operation of this defence of ....., the prosecution must exclude it as operating in respect of all the acts within that range of potentially fatal acts.]**

**Members of the jury, in the event you are satisfied beyond a reasonable doubt of all three of the elements we have discussed then you would find the defendant guilty of manslaughter. It is essential to such a conclusion though that all three elements have been proved beyond a reasonable doubt. It you have a reasonable doubt as to whether any one or more of those elements has been proved beyond a reasonable doubt then you would find the defendant not guilty of manslaughter.**

**Appendix A: Elements of Manslaughter**

*R v* .....

	To prove manslaughter the prosecution must prove all of these three elements beyond reasonable doubt:
<b>Death</b>	(1) [x] is dead; and
<b>Causation</b>	(2) the defendant caused [x]'s death; and
<b>Unlawfulness</b>	(3) the defendant did so unlawfully (that is, any defences are excluded beyond a reasonable doubt).